BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA K. BOSLEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,017,488
USD 259	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the March 2, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on June 15, 2007, in Wichita, Kansas.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties agreed the October 5, 2004, medical report of Dr. Philip R. Mills was part of the evidentiary record.

ISSUES

Claimant alleges she injured her mid and low back; right leg, knee and toes; neck and left shoulder on May 1, 2004, while working for respondent. In the March 2, 2007, Award, Judge Barnes found claimant had a 31 percent task loss and a 100 percent wage loss, or a 65.5 percent permanent partial general disability, under K.S.A. 44-510e. The Judge also found claimant sustained a 10 percent whole person functional impairment.

Respondent contends Judge Barnes erred. It argues claimant's permanent disability should be limited to her whole person functional impairment rating, which respondent contends is only five percent as determined by Dr. Chris D. Fevurly. In the alternative, respondent argues claimant's whole person functional impairment rating is only 6.67 percent, which is an average of the ratings provided by Dr. Fevurly, Dr. Paul S. Stein

and Dr. George G. Fluter. Respondent asserts Dr. Pedro A. Murati's 21 percent whole person rating is inflated and, therefore, the Board should disregard it.

In the event the Board should determine claimant has sustained a work disability (a permanent partial general disability greater than the functional impairment rating), respondent argues that work disability should be limited to 11.5 percent, which represents a 23 percent task loss and a zero percent wage loss. The task loss percentage is derived by averaging Dr. Fevurly's zero percent task loss percentage with Dr. Fluter's 46 percent task loss percentage. Regarding the zero percent wage loss percentage, respondent argues claimant failed to make a good faith effort to find appropriate employment but she retains the ability to earn a comparable wage by operating a home-based day-care business.

Claimant contends the Award should be affirmed. Claimant argues she made a good faith effort to find appropriate work after respondent terminated her and, therefore, her wage loss is 100 percent. Likewise, claimant argues the Judge properly determined she had a 31 percent task loss, which is an average of the task loss percentages provided by Dr. Fevurly (zero percent), Dr. Fluter (46 percent), and Dr. Murati (46 percent).

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed. As set forth below, the Board finds that as a result of her May 1, 2004, accident, claimant sustained a 31 percent task loss and a 100 percent wage loss, which creates a 65.5 percent work disability.

On May 1, 2004, claimant was pulled down by a table that she was picking up to stack against a wall. The parties stipulated claimant's accident arose out of and in the course of her employment as one of respondent's custodians.

Over the next few hours following the accident, claimant developed pain and discomfort in her neck, back, left shoulder, and left upper extremity. She also experienced a loss of sensation in fingers on her left hand. Claimant initially believed she might be having a heart attack and she sought treatment from her personal physician, Dr. Ludlow. But Dr. Ludlow suspected claimant's symptoms were muscle related.

After missing several weeks of work, claimant resumed working for respondent and worked from June 2004 until February 11, 2005, when respondent discontinued her accommodated work duties and terminated her employment. When claimant testified at

her July 2006 regular hearing, she remained unemployed despite making approximately 283 contacts with potential employers. At that time claimant was *hoping* to obtain a day-care license and *hoping* to be assigned to care for four or five children through a Head Start program. Claimant testified she did not know what she would receive for those services.

The issue on this appeal is the nature and extent of claimant's injuries and disability. A brief review of her medical treatment and the various medical opinions is helpful. On May 5, 2004, claimant began treating with Dr. Dobyns, who prescribed physical therapy and gave her restrictions. X-ray studies in June 2004 indicated mild degenerative changes of the lumbosacral spine. An MRI study in July 2004 revealed mild bilateral lateral recess stenosis at L5-S1 and modest lower lumbar spondylosis. Dr. Dobyns did not testify in this claim.

Dr. Paul S. Stein, who is a board-certified neurological surgeon, examined claimant in August 2004 for Dr. Dobyns and again in April 2005 for Dr. Mills. Dr. Stein felt claimant had both a cervicothoracic strain and lumbar soft tissue strain. The doctor believed that under the fourth edition of the AMA *Guides*[1] claimant's low back condition fell within DRE (Diagnosis-Related Estimates) lumbosacral category II for a five percent whole person impairment. But Dr. Stein concluded claimant's neck condition fell within DRE cervicothoracic category I for a zero percent impairment. At the second examination, claimant was concerned about atrophy in her quadriceps. Dr. Stein, after reviewing a lumbar myelogram/CT scan that showed no nerve root compression, thought the atrophy was caused by claimant's diabetes. Dr. Stein did not provide an opinion regarding claimant's potential task loss.

Judge Barnes authorized Dr. Mills to evaluate and treat claimant. Dr. Mills first examined claimant in early October 2004 and provided her testing and treatment until he moved to another state. Dr. Mills did not testify.

Dr. George G. Fluter, who is board-certified in physical medicine and rehabilitation, began treating claimant in July 2005 after Dr. Mills had departed. Dr. Fluter saw claimant on several occasions during 2005 and 2006, with his last examination of claimant being in July 2006. He diagnosed chronic low back pain, lumbosacral spine sprain, cervicothoracic sprain, and myofascial pain. Dr. Fluter also diagnosed right femoral diabetic amyotrophy, which he did not feel was related to claimant's accident at work. Using the fourth edition of the AMA *Guides*, Dr. Fluter concluded claimant's neck condition fell within DRE cervicothoracic category II for a five percent whole person impairment and her low back condition fell within DRE lumbosacral category II for a five percent whole person

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

impairment, which combined for a 10 percent whole person impairment. In addition, the doctor thought claimant's left shoulder pain was a manifestation of her cervicothoracic sprain and myofascial pain.

Dr. Fluter also concluded claimant should observe certain work restrictions and limitations. Dr. Fluter believed claimant should restrict lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently; restrict bending, stooping and twisting to an occasional basis; avoid squatting, kneeling, crawling and climbing; avoid holding her head and neck in awkward and/or extreme positions; restrict activities at or above shoulder level to an occasional basis; and avoid prolonged standing and walking (with allowances being made to change positions as needed for comfort). And after reviewing a task list prepared by claimant's labor market expert, Jerry D. Hardin, Dr. Fluter concluded claimant should no longer perform 21 of the 46 nonduplicated work tasks, or 46 percent, that claimant performed in the 15-year period before her accident.

At claimant's attorney's request, Dr. Pedro A. Murati, who is board-certified in physical medicine and rehabilitation, examined claimant in early July 2006. Dr. Murati diagnosed claimant with myofascial pain syndrome in the left shoulder girdle, neck, and thoracic spine. He also diagnosed right sacroiliac joint dysfunction and low back pain secondary to degenerative disc disease with radiculopathy. Dr. Murati strongly believed that claimant did not have diabetic amyotrophy because the doctor's sister suffered from diabetes and he was quite familiar with it. The doctor also diagnosed claimant with bilateral carpal tunnel syndrome and bilateral ulnar cubital syndrome, but the doctor did not attribute those maladies to claimant's May 2004 accident.

Using the fourth edition of the AMA *Guides*, the doctor concluded claimant's low back condition fell within DRE lumbosacral category III for a 10 percent whole person impairment and that her neck condition fell within DRE cervicothoracic category II for a five percent whole person impairment. In addition, the doctor found claimant sustained a five percent whole person impairment for the myofascial pain as indicated by DRE thoracolumbar category II and an additional four percent to her left upper extremity (two percent whole person impairment) for lost range of motion in the shoulder. Combining those percentages, Dr. Murati concluded claimant sustained a 21 percent whole person impairment.

Dr. Murati also determined claimant should observe work restrictions and limitations. It was Dr. Murati's opinion claimant could sit on an occasional basis and stand and walk on a frequent basis; she should rarely bend, crouch or stoop; she could climb stairs on an occasional basis; she should not climb ladders; she could squat on an occasional basis; she should not crawl; she could drive on an occasional basis; she should not perform work above her shoulders; she should not lift, carry, push or pull more than 20 pounds, and she should limit those particular activities to no more than 20 pounds on an occasional basis

and no more than 10 pounds on a frequent basis; she should not work more than 18 inches from the body (right and left); she should avoid awkward positions of the neck; and she should alternate sitting, standing and walking. The doctor noted on the release to return to work form dated July 6, 2006, "[d]oes not include [bilateral carpal tunnel syndrome] & [ulnar cubital syndrome]."[2]

Finally, after reviewing Mr. Hardin's list of former work tasks, Dr. Murati concluded claimant lost the ability to perform 21 of the 46 nonduplicated tasks, or approximately 46 percent.

In July 2006, Dr. Chris D. Fevurly, who is board-certified in internal medicine and occupational medicine, examined claimant at respondent's request. Dr. Fevurly concluded claimant had chronic generalized spinal pain in her neck, mid back, and low back. The doctor also noted findings of bilateral shoulder impingement and slight atrophy in her right thigh, which the doctor attributed to diabetic amyotrophy. The doctor related most of claimant's symptoms to degenerative changes, which she had exacerbated, in her neck, mid back, low back, and shoulders. Dr. Fevurly believed claimant had a five percent whole person functional impairment due to her lumbar spine but he believed she could return to work and perform her former job as a custodian. Moreover, Dr. Fevurly reviewed a list of former work tasks prepared by respondent's vocational expert, Steve Benjamin, and concluded claimant had no task loss.

The Board affirms the Judge's finding that claimant sustained a 10 percent whole person functional impairment due to the injuries she sustained at work on May 1, 2004, to her neck; upper, mid and low back; and shoulders. Consequently, claimant's permanent disability benefits should be computed under K.S.A. 44-510e, which provides in part:.

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the

[2] Murati Depo., Ex. 3.

> human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as created by K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

But when a worker has made a good faith effort to find other work, K.S.A. 44-510e should be applied as written and the worker's actual post-injury wages are utilized in the wage loss prong of the permanent partial general disability formula.

Following claimant's May 1, 2004, accident, respondent provided claimant with accommodated work through approximately February 11, 2005. Consequently, as claimant was earning at least 90 percent of her pre-injury wages, her permanent disability benefits under K.S.A. 44-510e for the period through February 11, 2005, are based upon her 10 percent whole person functional impairment.

Now, we must address claimant's permanent disability for the period following her termination. Claimant has a ninth grade education. Between her termination in February 2005 and her regular hearing in late July 2006, claimant made approximately 283 contacts with potential employers. Unfortunately, claimant has been unable to obtain another job. The Board finds claimant has made a good faith effort to find appropriate work and, therefore, her actual post-injury wages for purposes of the wage loss prong of the permanent disability formula should be used.

Averaging the task loss percentages provided by Dr. Fevurly, Dr. Fluter, and Dr. Murati, the Judge found claimant sustained a 31 percent task loss. The Board adopts that finding as its own. And averaging the 31 percent task loss percentage with claimant's 100 percent wage loss, the Board finds claimant has sustained a 65.5 percent permanent partial general disability.

The Board is mindful respondent contends that claimant retains the ability to start a day-care business and earn a comparable wage. At the time of the regular hearing, claimant was contemplating such a business. The record, however, does not establish how far claimant has progressed in obtaining the necessary contracts with the Head Start program she was considering or the number of children she has been able to obtain. Should claimant be successful in her business endeavors, respondent may request review and modification of the award.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

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[7] *Id.* at Syl. ¶ 4.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[8] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the March 2, 2007, Award entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

[8] K.S.A. 2006 Supp. 44-555c(k).